nationwide. As the *Ruling & Notice* stated, "[g]iven that [the Commission] has found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee is determined" under Section 622(b).[131] The Commission recognized that its ruling would directly raise the issue of whether such fees were lawfully collected from subscribers prior to the Commission's classification determination, and whether the fees so collected should be refunded.[132] The Commission sought comment on whether it should resolve this issue or leave it to the courts.[133] As the Commission correctly recognized, the timing of its ruling created this national franchise fee refund issue. The Commission accordingly should assert jurisdiction to resolve it. The Commission is the only entity with authority over all the affected parties, including LFAs, cable operators and subscribers nationwide, and it is in the best position to evaluate the questions of national communications policy involved. It would be anomalous for the Commission to abandon this issue in mid-course for the courts to decide, especially given the courts' lack of jurisdiction over all of those very same parties and the likelihood of conflicting results that inevitably would impinge on questions of national communications policy.

The Commission would not be plowing new ground by taking up this critical refund question. "[T]he Commission's policy has been to resolve franchise fee questions that bear directly on a national policy concerning communications and that call upon [its] expertise."[134] Indeed, Commission precedent establishes that questions, such as the refund issue here, regarding whether a particular charge was properly included in the franchise fee calculation and

---

[131] *Ruling & Notice*, FCC 02-77 at ¶ 105.

[132] *Id.* at ¶ 106.

[133] *Id.*

passed through to subscribers already lie within the Commission's exclusive jurisdiction. In contrast to individual local disputes that the courts may resolve, the Commission has consistently held that the issue of how franchise fees are calculated under Section 622(b) "necessarily impinges a national policy on cable franchise fees" and therefore should be decided by the Commission.[135] In the *Comcast Letter Ruling*, for example, the Cable Service Bureau observed that the Commission's "rules and procedures . . . provide the exclusive means for determining whether franchise fees have been properly 'passed through' and whether the resulting rates are permissible."[136] The issue in that case was whether claims brought in class-action lawsuits by cable subscribers against their cable operators, alleging that the cable operators overcharged subscribers by miscalculating the amount of franchise fees, were matters of cable television rate regulation. The letter ruling concluded that "the Commission regards questions relating to the propriety of such franchise fee pass-throughs as rate regulation matters" within its exclusive jurisdiction.[137]

Similarly, the Commission exercised jurisdiction in the *Dallas Franchise Fee Pass Through Decision* to resolve disputes that are the mirror image of the franchise fee refund issue

---

...continued

[134] *Id.* at ¶ 107.

[135] *Id.*; *see also* Franchise Fee "Pass Through" and Dallas v. FCC, *Memorandum Opinion and Order*, 13 FCC Rcd 4566, 4569-70 (1998) ("*Dallas Franchise Fee Pass Through Decision*").

[136] Comcast Cable Communications, Inc., c/o Thomas R. Nathan, Esq., *Letter*, 13 FCC Rcd 9254 (1997) ("*Comcast Letter Ruling*").

[137] *Id.* The *Comcast Letter Ruling* is entirely consistent with the well-established principle that rate regulation issues are within the Commission's exclusive jurisdiction. 47 U.S.C. § 543(a)(1). Federal and state courts and the Commission are unanimous that any question of whether franchise fees have been properly passed through to subscribers is a question of rate regulation. *See, e.g.*, *Westmarc Communications, Inc. v. Conn. Dep't of Pub. Util. Control*, 807 F. Supp. 876 (D. Conn. 1990); *Bass v. Prime Cable of Chicago, Inc.*, 674 N.E.2d 43, 49 (Ill. App. Ct. 1996).

here.[138] Cable operators there had excluded franchise fee payments from the gross revenues pool on which their franchise fees were calculated, as a direct result of a Commission ruling authorizing such exclusions. After the Fifth Circuit reversed the Commission's holding, cable operators requested clarification of whether those who had relied on that Commission holding could pass through to subscribers increases in their franchise fee payments that they now were required to make to compensate for previous underpayments. The Commission exercised jurisdiction to resolve the issue on the grounds that "[t]he [franchise fee] limitation in question is contained in Section 622 of the Communications Act and the rate regulation and franchise fee pass through rules have been adopted pursuant to Section 623 of the Communications Act;" accordingly, these disputes "impinge on 'national policy concerning cable communications.'"[139]

In this case, LFAs' imposition of the fees on cable modem service gross revenues and cable operators' pass through of those fees were the direct result of conflicting court opinions and the Commission's silence on the service's regulatory classification. LFAs and cable operators are seeking clarification as to whether (and, if so, how) those fees should be refunded to subscribers now that the Commission's ruling has established that the franchise fee calculation should not include such revenues in the future. Just as in the *Dallas Franchise Fee Pass Through Decision*, the franchise fee issue here does not arise from local issues and facts, but instead implicates national communications policy under Sections 622 and 623 and requires Commission resolution.

Moreover, the fact that the cable modem franchise fee refund issue affects LFAs, cable operators and subscribers nationwide mandates Commission resolution of the issue, as

---

[138] 13 FCC Rcd 4566.

[139] *Id.* at 4569-70.

established by the Commission's decision in the *Time Warner Franchise Fee Declaratory Ruling*.[140] In that case, the Commission considered whether uncollected debt should be included in the calculation of gross revenues subject to the cable service franchise fee. While that issue might be perceived on its face to be an accounting question of purely local character, the Commission held that it implicated national communications issues and policy. The Commission ruled that, because the issue of what elements must be included in the calculation of franchise fees under Section 622 "potentially affects cable operators nationwide," it is "precisely the kind of issue that falls within the Commission's 'national policy' rubric."[141]

In the *Ruling & Notice* here, the Commission noted that "the fees in question were collected pursuant to section 622 and that our classification decision will alter, *on a national scale*, the regulatory treatment of cable modem service."[142] The Commission explained,

> We note that until the release of the Commission's declaratory ruling to the contrary, cable operators and local franchising authorities believed in good faith that cable modem service was a "cable service" for which franchise fees could be collected pursuant to section 622. . . . [C]able operators and franchising authorities could not have been expected to predict that the Commission would classify cable modem service as other than a cable service.[143]

As these statements recognize, nearly all LFAs, cable operators and subscribers nationwide have this same issue and have labored under the same conflicting court opinions and the same regulatory uncertainty. Significantly, only a ruling by the Commission (or the Supreme Court)

---

[140] Time Warner Entertainment/Advance-Newhouse Partnership Petitions for Declaratory Ruling on Franchise Fee Issues, *Memorandum Opinion and Order*, 14 FCC Rcd 7678 (1999) ("*Time Warner Franchise Fee Declaratory Ruling*").

[141] *Id.* at 7683.

[142] *Ruling & Notice*, FCC 02-77 at ¶ 107 (emphasis added).

[143] *Id.*

can resolve the issue conclusively by binding all affected parties. As such, under the *Time Warner Franchise Fee Declaratory Ruling*, the refund issue falls squarely within the "national policy rubric" and mandates Commission resolution.

This resolution, moreover, must occur promptly. Unless the Commission acts quickly to assert jurisdiction to resolve cable modem franchise fee refund disputes, all cable operators and LFAs in the country could become targets for lawsuits and inconsistent court decisions. As an example, Cox already is the subject of a class action in the U.S. District Court for the Western District of Virginia in which subscribers are seeking recovery of franchise fees previously collected on cable modem service gross revenues.[144] The court limited the class to subscribers in the Western District of Virginia because it could not assert personal jurisdiction over LFAs outside of that District. If the Commission were to leave the refund issue to the courts, individual courts all over the country may have to confront this same issue, because LFAs generally are not subject to personal jurisdiction outside of their locality. The threat for varying and conflicting holdings by courts with limited jurisdiction and substantive expertise is extreme. There is no way to predict accurately the differing standards and analyses the various courts might adopt.

By contrast, the Commission has both the nationwide jurisdiction and the expertise to evaluate the questions involved and to resolve the refund issue. The Commission knows the regulatory scheme for the calculation, collection, pass through and refund of franchise fees; the climate and causes of regulatory uncertainty that existed prior to its classification ruling; the difficult position of LFAs and cable operators as they have labored to determine their respective

[144] *Bova v. Cox Communications, Inc.*, Civil Action No. 7:01 CV 00090 (W.D. Va.) (motions to dismiss and for summary judgment pending).

obligations; and the nature of their relationships and responsibilities, both in legal terms under the provisions of the Act and under the Commission's regulations, and in practical terms in their day-to-day operations. The Commission is in the best position to decide the propriety of a refund requirement and, if such a refund were deemed appropriate, the proper mechanism for providing the refund.[145] It accordingly should assert its exclusive jurisdiction over this critical question.

VIII. THE COMMISSION IS CORRECT IN ITS TENTATIVE CONCLUSION TO FORBEAR FROM TITLE II REGULATION TO THE EXTENT CABLE MODEM SERVICE MAY BE SUBJECT TO SUCH REGULATION IN THE NINTH CIRCUIT.

The Commission is certainly correct in its tentative conclusion that it should forbear from applying Title II regulation to cable modem service in the Ninth Circuit (and anywhere else a court issues a ruling that conflicts with the Commission's regulatory classification).[146] The fundamental premise underlying the classification of communications services is that identical services should be treated in a uniform and predictable manner across the country. The Ninth Circuit's opinion two years ago in *AT&T v. City of Portland* has created a temporary regulatory anomaly by indicating that the cable modem service at issue there included a Title II "telecommunications service component." As the Commission noted, however, the Court also

---

[145] The Commission has not requested comment on how to resolve the refund issue, and Cox is not seeking any particular outcome from the Commission at this point, so long as cable operators are not left in the middle. If the Commission adopts a refund requirement, Cox would be happy to facilitate the process by passing through refunds from LFAs to subscribers. If the Commission rules that individual LFAs can make the decision whether (a) to refund the money they currently hold or (b) to use the fees for the benefit of their consumer constituency, that outcome also would be acceptable, so long as the Commission makes clear that LFAs who choose the refund route must provide the refund funds. In no event should cable operators be required to pay the franchise fees twice by making "refunds" to subscribers, given that cable operators already paid all the fees to LFAs.

[146] *See Ruling & Notice*, FCC 02-77 at ¶ 95.

stated that the Commission has broad authority to forbear from imposing Title II regulation on cable modem service.[147] The Commission, with the benefit of a fully developed record, now has ruled that "[c]able modem service is not itself and does not include an offering of telecommunications service to subscribers."[148] There is no factual or logical basis to treat the same service differently in the Ninth Circuit than it is treated in all other parts of the country, either to ensure fair and reasonable rates or to serve any other public interest. Indeed, the overriding public interest lies in ensuring that one set of rules applies to all cable modem service providers in the United States. The Commission accordingly should adopt its tentative conclusion to forbear from the application of any common carrier regulations to cable modem services in the Ninth Circuit. The fact that the Declaratory Ruling is on review in the Ninth Circuit further supports such an approach, because forbearance may be needed only until the Ninth Circuit resolves the conflict and any need for forbearance in this case.

A. Background And Scope Of The Problem: A Regulatory Anomaly In One Circuit.

The *Ruling & Notice* described the Ninth Circuit's June 22, 2000, decision in *Portland* and the potential problem it creates for a uniform national regulatory framework for cable modem service.[149] Although the Ninth Circuit only had to address the narrow issue of whether an LFA, whose authority was limited to cable service, had the power to tie approval of a merger to a mandatory access condition, it went on to conclude that a component of cable modem service may be a telecommunications service subject to common carrier regulation.[150] As the

---

[147] *Id.* at ¶ 58, n.219.

[148] *See id.* at ¶ 39.

[149] *Id.* at ¶¶ 56-58.

[150] *AT&T v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000).

Commission noted, the Ninth Circuit had a limited record with no briefing from the parties on the classification issue and no expert opinion from the Commission.[151] The parties had assumed the service was a cable service, and so the court had no lower court record on the issue and, of course, no administrative record at all.[152]

On July 11, 2001, the Fourth Circuit addressed the classification issue in a case similar to *Portland*, involving whether LFAs were preempted from imposing access conditions on cable franchise transfers.[153] The court found preemption without the need to decide the classification issue. In fact, the court deliberately avoided ruling on the classification of cable modem service, observing that the issue is "complex and subject to considerable debate. The outcome will have a marked effect on the provision of Internet services." The court noted the Commission's broad authority over the matter and found the issue should be left to the "expertise of the FCC."[154]

On January 16, 2002, the Supreme Court considered the classification of cable modem service, and it too deferred to the Commission's expertise. Although finding the Commission already had decided that cable modem service was not a telecommunications service, the Court made clear that the Commission had yet to decide the ultimate classification of the service.[155] The Court acknowledged that the regulatory framework for cable modem service involves

---

[151] As the Commission observed, "[n]otably, the Commission, filing as *amicus curiae*, was not a party to the case and did not provide its expert opinion on this issue." *Ruling & Notice*, FCC 02-77 at ¶ 57.

[152] The Commission also correctly notes that the Ninth Circuit could have decided the case on the ground that, because the service was not a cable service, the LFA lacked the power to impose the access condition, given that the ordinance involved was limited to cable services. *Id.* at ¶ 58.

[153] *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001) ("*Henrico County*").

[154] *Id.* at 365.

[155] *Gulf Power*, 122 S. Ct. at 788.

technical and policy considerations within the Commission's particular field of expertise and authority, that the Commission has broad jurisdiction to decide these issues, and that their resolution requires uniformity in administration throughout the industry.[156] The Supreme Court noted the importance of judicial deference to the Commission under *Chevron* on these questions and stressed that challengers to the Commission's approach must prove that the agency's statutory interpretation is unreasonable.[157]

Finally, as the Commission notes, a lawsuit was filed in the U.S. District Court for the Southern District of California seeking to compel Cox to provide an alleged "transport component" of its cable modem service on a common carrier basis, based on the language in the Ninth Circuit's *Portland* decision.[158] The district court ruled that it was bound to follow the *Portland* decision, but noted that the Ninth Circuit recognized the Commission's broad authority to forbear from imposing Title II regulations on cable modem service and, therefore, the district court must await the outcome of the Commission's proceeding. The court observed that "[t]he issue is clearly not being taken lightly by the experts at the FCC, and this Court defers to that concern and pending investigation." The court granted a stay of its proceedings pending the Commission's resolution of the forbearance issue.

In the *Ruling & Notice*, the Commission addressed the broad issue of "the appropriate national framework for the regulation of cable modem service" on a full administrative record with the benefit of extensive public comment. The Commission ruled that cable modem service is an interstate information service, not subject to common carriage obligations under Title II.

---

[156] *Id.* at 789-90.

[157] *Id.* at 786, 789.

[158] *GTE.Net LLC v. Cox Communications, Inc.*, 185 F. Supp. 2d 1141, 1147 (S.D. Cal. 2002) ("*GTE.Net*").

The Commission recognized that, although parties are developing technical solutions and business models to bring additional ISPs on the platform, the shared nature of the cable modem platform precludes the offering of a transport "component" of cable modem service on a common carrier basis. The Commission thus determined that cable operators do not provide a segregable telecommunications service, but rather offer an integrated information service, when they provide cable modem service to consumers.[159]

The *Ruling & Notice* is now on review in the Ninth Circuit, which will address the classification issue with the guidance of the Supreme Court's opinion in *Gulf Power* and the Commission's extensive administrative record and expertise. It is important to note that the Supreme Court's decision in *Gulf Power* was issued well after the Ninth Circuit's decision in *Portland*. Although it did not expressly overrule *Portland*, the Supreme Court plainly considered the regulatory classification and treatment of cable modem service to be an open issue still within the province of the Commission, notwithstanding the *Portland* decision (which was addressed in the dissenting opinion). Indeed, all courts to consider the issue, including the Supreme Court and the Ninth Circuit, have noted the importance of deferring to the Commission as the expert agency tasked by Congress to establish a national regulatory framework for cable modem service.[160] As a result, the Ninth Circuit should defer to the Commission's ruling that cable modem service is properly classifies as an interstate information service.

---

[159] *Ruling & Notice*, FCC 02-77 at ¶ 39.

[160] *See, e.g., Gulf Power*, 122 S. Ct. at 782 (stating that the Commission's reasonable statutory interpretation is given deference); *Portland*, 216 F.3d at 879-80 (stating that "Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters"), *Henrico County*, 257 F.3d at 365 (leaving issues of whether cable modem service is a cable service, a telecommunications service, or an information service to the Commission's expertise); *GTE.Net*, 185 F. Supp. 2d at 1147 ("The regulation of cable Internet

continued...

In the meantime, pending the outcome of the Ninth Circuit's review and any subsequent proceedings, cable modem service providers in the Ninth Circuit are in an anomalous position. The Commission held that cable modem service is an information service and does not contain a telecommunications service. Yet, the Ninth Circuit stated in *Portland* that a component of cable modem service is a "telecommunications service" subject to common carrier obligations under Title II. This presents potentially conflicting regulatory obligations. The conflict is especially problematic because cable modem service providers' infrastructure crosses state lines, possibly requiring providers to create separate physical systems for the Ninth Circuit alone. Moreover, although (as the Commission noted) no cable operator is providing a stand-alone offering of a transmission path on the cable modem platform for a fee to the public, the Ninth Circuit's language might require operators to stop providing cable modem service until they can devise a method to offer such pure transport over the cable modem network on a common carrier (and not private carriage) basis.

B. Forbearance Is The Necessary And Appropriate Solution.

Regulatory forbearance is appropriate and fully justified under the circumstances of this case. Section 10 of the Communications Act *mandates* Commission forbearance from unnecessary Title II regulation, and specifically authorizes forbearance on a limited, geographic basis, if the Commission determines that (1) enforcement of such regulation is unnecessary to ensure that the charges or practices in connection with a telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such

---

...continued

involves complex issues with far-reaching consequences. The issue is clearly not being taken lightly by the experts at the FCC, and this Court defers to that concern and pending investigation.").

regulation is unnecessary for the protection of consumers; and (3) forbearance from applying such regulation is consistent with the public interest.[161] These requirements are fully satisfied here.

As an initial matter, it is important to note that the Commission's authority to forbear in this case is not limited to individual regulations. As the Ninth Circuit recognized, the Commission has "broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest."[162] The U.S. District Court for the Southern District of California echoed that view.[163] The issue thus is not whether a particular Title II provision ought to apply to a common carrier, but whether the regulatory classification itself, with all its implications, should apply to cable modem service providers in one geographic region (but no others) until the matter is ultimately resolved by the Ninth Circuit or in subsequent proceedings. The reasons justifying forbearance in this case apply to the entire Title II regulatory structure. Under these circumstances, it is appropriate for the Commission to consider forbearance from application of Title II generally, rather than go through the exercise of considering each regulation individually.

1. The Enforcement of Common Carrier Regulation on Cable Modem Service Is Unnecessary to Ensure Just and Reasonable Rates and Practices.

The Commission tentatively concluded that "enforcement of Title II provisions and common carrier regulation is not necessary . . . to ensure that rates are just and reasonable and

---

[161] 47 U.S.C. § 160(a).

[162] *Portland*, 216 F.3d at 879.

[163] *GTE.Net*, 185 F. Supp. 2d at 1147.

not unjustly or unreasonably discriminatory."[164] Among the reasons identified for this conclusion were that "cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing."[165] This analysis is correct.

For the same reasons the Commission classified cable modem service as an information service, common carrier regulation is unnecessary to ensure just and reasonable rates and practices. As discussed previously, the Commission has a long, well-settled history of classifying enhanced or information services as services that are not, and should not be, subject to Title II regulation.[166] In the *Computer Inquiries*, the Commission determined that the imposition of a comprehensive regulatory scheme for such enhanced services would be counterproductive because the market for such services is "truly competitive," and market forces would ensure reasonable rates and the availability of services.[167] These principles are fully applicable here. As the Commission found, cable modem service is an advanced and highly technical service providing enhanced functions to subscribers. It is not an established monopoly for which Title II common carrier regulation was designed; it is a nascent, evolving service in a market with growing competition. It must compete in an environment of rapid technological change that would suffer from heavy-handed regulation. Cable modem service providers are working on bringing additional ISPs to subscribers, and they have made substantial investments

---

[164] *See Ruling & Notice*, FCC 02-77 at ¶ 95.

[165] *Id.*

[166] *See id.* at ¶ 95 ("The Commission has a long history of classifying information services as Title I services and thus not subject to the obligations and requirements imposed on services subject to Title II."); *MCI Telecomms. Corp. v. Sprint-Florida, Inc.*, 139 F. Supp. 2d 1342, 1346 (2001); *Report to Congress*, 13 FCC Rcd at 11508.

[167] *CCIA*, 693 F.2d at 207.

of time and money to accomplish that goal. There is simply no evidence of market failure or the need for regulation. The Commission's analysis that this burgeoning service must be allowed to thrive in an open marketplace free from unnecessary, contradictory regulations is entirely correct.

In addition, the Commission's analysis to forbear from imposing Title II regulation on cable modem service is consistent with its own goals and congressional directives to promote broadband services with as little regulation as possible. As the Commission rightly observed in *Computer II*, "the very presence of Title II requirements inhibits a truly competitive, consumer responsive market."[168] This observation is particularly apt here. Title II regulation is not only unnecessary in the Ninth Circuit, but its very imposition may inhibit a truly competitive market by creating regulatory uncertainty and imposing needless regulatory burdens on competitive Internet services.[169] Indeed, a special set of rules would be necessary to adapt Title II regulatory requirements to cable modem service, because Title II plainly was not designed to apply to such networks.

For example, how could cable operators be required to provide a "transport component" of their cable modem service, if they are not offering that service now and cannot offer that service with their existing technology? If part of the cable modem service is an unregulated information service (as the Ninth Circuit stated), how would a theoretical transport component be broken out and provided, let alone priced and regulated? Must cable modem service providers

---

[168] *Computer II*, 77 F.C.C.2d at 426.

[169] *See Ruling & Notice*, FCC 02-77 at ¶ 5 (stating that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market. In this regard, we seek to remove regulatory uncertainty that in itself may discourage investment and innovation.").

cease providing the service to all subscribers until the technical issues might be resolved? What obligations could the provider impose on the users of the theoretical transport component to ensure the proper, managed use of the shared bandwidth on the cable modem network to enable the service to work for all subscribers? What would be the impact on the provision of the service across the boundaries of the Ninth Circuit, where the service would not be subject to common carrier regulation? And how would any of this work on a common carriage (as opposed to private carriage) basis? The Commission would have to work out these regulatory details and many others merely to enable the imposition of Title II regulation on cable modem service in one part of the country.

Plainly, any conclusion resulting in enforcement of Title II regulation on cable modem service in the Ninth Circuit would intensify regulatory complexity and uncertainty. This, of course, would defeat congressional and Commission goals by stifling the provision of cable modem service in the Ninth Circuit and discouraging investment in the technology generally. There is no reason why cable modem service in the Ninth Circuit should be singled out as subject to common carrier regulation, while the identical service is not subject to such regulation anywhere else. There is nothing unique about the geographic region or market encompassed by the Ninth Circuit to justify dramatically different regulatory treatment to ensure fair and reasonable rates or practices.

2. The Enforcement of Title II Regulation Is Unnecessary for the Protection of Consumers.

For similar reasons, the enforcement of common carrier regulations in the Ninth Circuit is unnecessary to protect consumers. As described above and in Section II of these comments, no market failure exists in the provision of cable modem service to consumers. Consumers across the United States benefit from continually emerging competition in the provision of residential

Internet access services, and consumers in the Ninth Circuit are no different. In fact, adding regulatory burdens and uncertainty to cable modem service providers in one Circuit would be detrimental to consumers in that region. They would suffer to the extent cable modem service providers were compelled to stop providing the service to avoid a failure to comply with ill-fitting and impossible Title II obligations.

3. Forbearance Is Consistent with the Public Interest.

Plainly, the public interest is best served by regulatory forbearance under the circumstances here. The Commission explained its reasoning on this issue:

> Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service. We also believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing.[170]

Guidance on this issue is provided in Section 10(b):

> In making the [public interest] determination . . . the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.[171]

The reasons described above why the first two requirements of Section 10 are satisfied here are also fully applicable under the public interest analysis. While it is difficult to apply Section

---

[170] *See id.* at ¶ 95.

[171] 47 U.S.C. § 160(b).

10(b) literally (because cable modem service is not a telecommunications service), the principle is instructive. Forbearance certainly would continue to promote competition among Internet access providers, and the imposition of common carrier requirements would accomplish precisely the opposite by impeding the provision of cable modem service.

It is hard to disagree with the proposition that the public would benefit from a uniform framework for the regulation of cable modem service across the country. This is the best and most efficient way for the Commission to apply a consistent policy to this interstate information service, to ensure that cable operators, LFAs, ISPs and others have clear guidance on what regulations govern cable modem service, and generally to avoid uncertainty and litigation. There is no public interest served by the coexistence of two conflicting regulatory schemes applicable to identical services provided in different federal Circuits.

CONCLUSION

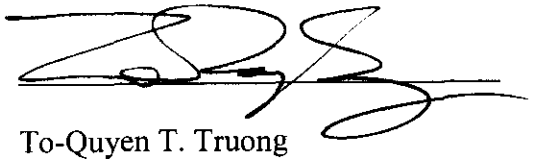
Competition is flourishing among Internet access service providers and will bring additional ISPs onto the cable modem platform on the most efficient terms. Government intervention in this competitive market not only is unnecessary but would pose enormous risks to deployment, to innovation and to service reliability. These are the very reasons that Congress has not given any level of government the authority to impose intrusive regulations on cable modem services. Consequently, the Commission should confirm that there is no legal or policy basis for imposing federal, state or local access and other regulations on cable modem service.

In addition, to avoid disputes regarding the need for express preemption, the Commission should explicitly preempt state and local regulation, including the imposition of franchise, franchise fee, access or other requirements on cable modem service. The Commission also should assert jurisdiction to resolve the cable modem franchise fee refund issue for LFAs, cable operators and subscribers throughout the country. Finally, the Commission should exercise its

broad authority to forbear from Title II regulation to the extent cable modem service may be subject to such regulation in the Ninth Circuit. Only by taking these actions can the Commission apply a consistent policy to cable modem service nationwide and effectuate the federal mandate to promote Internet and broadband investment, deployment and innovation in a market "unfettered by Federal or state regulation."

Respectfully submitted,

COX COMMUNICATIONS, INC.



To-Quyen T. Truong
David E. Mills
J.G. Harrington
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Its Attorneys

Alexander V. Netchvolodoff
Alexandra M. Wilson
COX ENTERPRISES, INC.
1225 19th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 296-4933

June 17, 2002

ATTACHMENT A

SAMPLING OF BENEFITS PROVIDED BY CABLE OPERATORS TO LOCAL FRANCHISING AUTHORITIES

Benefits Demanded by Local Governments:

- **Cable Franchise Fees**: Local franchising authorities ("LFAs") assess fees of up to 5% of cable operators' gross revenues from the provision of cable services, including:
  - basic and CPST analog and digital video revenue
  - premium and pay-per-view revenue
  - revenue from equipment sales and rentals
  - revenue from services such as installations
  - advertising revenue
  - home shopping channel revenue
  - revenues from late fee charges
  - monies received from programmers to offset new channel launch costs ("launch fees")
  - monies collected as franchise fees

- **Institutional Networks**: LFAs demand that cable operators meet local governments' institutional network needs in a variety of ways, including:
  - building and maintaining dedicated dark fiber strands, separate "B-cable" or "municipal" loops, or free or discounted commercial "institutional network" services
  - building and maintaining the equipment necessary to utilize the institutional network or institutional network services provided by the operator
  - providing funds for use by local government to purchase institutional network services from the operator or a third-party service provider

- **PEG Channel Capacity**: LFAs demand numerous analog and/or digital channels on cable networks for use by governmental and educational groups and by the public for the broadcast of governmental, educational and public access programming.

- **PEG In-Kind Support**: LFAs demand that cable operators assist in the operation of PEG channels in a variety of ways, including:
  - providing fiber optic links between and among city halls, schools, public access centers and the operator's headend
  - providing cameras, reception and transmission equipment, and other equipment necessary for the production and transmission of PEG programming

- providing separate fully-equipped studios for the production and transmission of PEG programming, or providing access to the operator's fully-equipped studio
- providing technical training and support for the production and transmission of PEG programming
- providing day-to-day operation and management of the PEG channels
- providing complimentary bill inserts and advertising avails
- including detailed PEG programming information in electronic programming guides

- **PEG Financial Support**: LFAs demand that cable operators make significant financial contributions over the term of the franchise to support the PEG channels, including:
  - providing capital contributions for PEG access facilities and equipment
  - providing contributions in support of the use of the PEG access facilities (Even though these payments are considered "franchise fees" under Section 622 of the Cable Act, LFAs continue to demand their payment, often by trying to disguise them as "capital" payments.)

- **Additional Use of System Capacity**: In addition to the channels provided for PEG use, LFAs require cable operators to allow LFAs use of the cable system in a variety of other ways, including:
  - installing fiber in the operator's conduit or attaching wires to the operator's poles or other facilities
  - using additional capacity of cable system for municipal purposes, such as traffic control monitoring systems and utility meter reading systems
  - providing access to the operator's emergency alert system (LFAs often require operators to maintain an EAS that far exceeds the EAS required under the FCC rules)

- **Complimentary Services**: LFAs demand that operators provide LFAs with valuable complimentary service, including:
  - providing complimentary installations, cable service and converters for private and public K-12 schools, post-secondary institutions, and vocational-technical schools
  - providing complimentary installations, cable service and converters for municipal office buildings, public libraries, fire and police stations and other municipal buildings
  - providing complimentary installations, high-speed Internet access service, and cable modems for private and public K-12 schools, post-secondary institutions, and vocational-technical schools
  - providing complimentary installations, high-speed Internet access service, and cable modems for municipal office buildings, public libraries, fire and police stations and other municipal buildings

- **Rights-of-Way Matters**: In addition to paying franchise fees and other financial benefits to the LFAs, LFAs require operators to do the following with respect to the public rights-of-way:
  - repairing and replacing rights-of-way to a condition at least as good as the condition immediately prior to construction activities
  - complying with all permitting requirements (including paying application and permit fees)
  - complying with street cut ordinances (some of which require the operator to repave the street 50 feet in each direction and to pay extremely high fees)
  - locating cable facilities underground in accordance with LFAs' beautification projects

- **Office/Personnel Requirements**: LFAs impose demands on operators regarding their business office and employees, including:
  - maintaining a staffed office in the city
  - registering trucks and other cable system vehicles in the city
  - ensuring that a certain percentage of cable system personnel be residents of the city

- **LFA's Regulatory Expenses**: LFAs demand that operators bear the LFA's costs incurred in connection with the franchise, including:
  - paying LFAs an application fee for requests for initial or renewal franchises
  - reimbursing LFAs for costs incurred in connection with an application to grant, renew, or transfer a franchise
  - reimbursing LFAs for other costs incurred in connection with regulating a franchise
  - paying an acceptance fee upon conclusion of the renewal process

- **Upgraded and/or "State of the Art" Cable Systems**: LFAs demand that cable operators upgrade their system (if the operator hasn't already upgraded the system voluntarily), or to agree to upgrade the system as necessary over the term of the franchise to ensure that it remains "state of the art".

- **Universal Service**: LFAs impose "universal service" requirements, such as:
  - serving all residents or all residents so long as a minimum density requirement is met
  - extending service into commercial and industrial districts, even when there is no business justification to do so

- **Additional Taxes and Fees:** In addition to the cable franchise fee, LFAs demand that cable operators pay all other applicable local taxes and fees, including:
  - sales and use taxes
  - ad valorem personal property taxes
  - possessory interest taxes

- real property taxes
- utility taxes
- telecommunications taxes
- fees to rent space on LFA owned towers

Secondary Benefits to Local Governments:

- **Charitable Contributions**: Cable operators are local businesses who contribute significantly to local charitable organizations.

- **Employment**: Cable operators are local employers. Even when not required by the franchise agreement, cable operators employ local residents in a variety of positions, including management-level positions, customer care representatives, and cable technicians.

- **Model Technology Schools**: In addition to the free services provided to schools, many cable systems have provided significant funds to establish "model technology schools" in the local community.